IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-3817

UNITED STATES OF AMERICA,
Appellee, Cross Appellant

v.

CHRISTOPHER WAYNE LAMOREAUX,
Appellant, Cross Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BRIEF OF APPELLANT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Christopher Wayne Lamoreaux was convicted of two counts of "honest services" mail fraud after a four day jury trial. The indictment alleged that Lamoreaux, president and CEO of NuCare Pharmaceuticals, Inc. and his wife, Adina, a former employee of NuCare, had defrauded NuCare , a pharmaceutical repackaging company, by accepting commissions from Albers Medical, Inc. in the amount of $115,278.54 in connection with a repackaging contract with Albers to repackage Lipitor and Bextra which were not reported to NuCare. Adina Lamoreaux was acquitted at the close of the government's case-in-chief.

Appellant raised numerous objections to various aspects of the case including a motion to dismiss the indictment for failure to include sentencing enhancements, objections to the testimony of a government witness, objections to the jury instructions, the submission of uninstructed special verdicts, the denial of the motions for judgment of acquittal and new trial and the application of the Sentencing Guidelines.

Appellant was sentenced to confinement for twenty-one months, to be followed by a tree year term of supervised release, a $200.00 mandatory

penalty assessment and restitution of $115.278.54.

Because of the numerous issues raised in this case and the complexity of those issues, Appellant respectfully requests this Court to grant thirty minutes for oral argument.

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WESTERN DIVISION

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Christopher Wayne Lamoreaux, was charged in a two count indictment the United States District Court for the Western District of Missouri alleging mail fraud in violation of 18 U.S.C. §§ 1341 and 2. This case was tried before the Honorable Howard F. Sachs, Senior United States District Judge and Appellant was convicted of both counts of the

indictment after a jury returned verdicts of guilty. On November 3, 2004, the District Court held a sentencing hearing and, after considering the Presentence Report which had been previously prepared, imposed a sentence of confinement of twenty-one months, a term of supervised release of the years to commence upon release from confinement, restitution in the amount of $115, 278.54 and a mandatory penalty assessment of $ 200.00.

A timely Notice of Appeal was filed in the United States District Court on November 15, 2004 in accordance with Rules 3 and 4(b)(1)(A), Fed. R. App. P.

The Jurisdiction of the United States Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1291 and 18 U.S.C. 3742 (a).

STATEMENT OF THE ISSUES ON APPEAL

I. The District Court erred in denying Appellant's Motions for Judgment of Acquittal and New Trial because the government's evidence did not establish an intent to defraud nor loss to Appellant's employer

A. Standard of Review

United States v. Cruz, 285 F. 3d 692, 698 (8th Cir. 2002).

B. Sufficiency of the Evidence of an Intent to Defraud

United States v.Pennington, 168 F.3d 1060 (8th Cir. 1999).
United States v. Jain, 93 F.3d 436 (8th Cir. 1996).
United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994).

II. The District Court erred in admitting the testimony of Diana Coelyn

III. The District Court erred in submitting Instruction H to the jury

United States v. Sun-Diamond Growers of California, 138 F.3d 961, 974 (D.C. Cir 1998).
United States v. Jain, 93 F. 3d 436 (8th Cir. 1996).

IV. The District Court erred in submitting special verdicts to the jury

V. The District Court erred in finding a loss, for sentencing purposes, in the amount of $ 115,278.54

United States v. Chatterje, 46 F.3d 1336, 1342, (4th Cir. 1995).

VI. The District Court erred in imposing a non-Sentencing Guidelines sentence without giving due consideration of the factors in 18 U.S.C. §3553(a) as required by the Supreme Court's holding in *United States v. Booker*

United States v. Booker, 125 S. Ct. 738 (2005).

United States v. Crosby, 2005 U.S. App. LEXIS 1699 (2nd Cir. 2005).

United States v. Ranum, 2005 U.S. Dist. LEXIS 1338 (E.D. Wis. 2005).

United States v. Myers, 2005 U.S. Dist. LEXIS 1342 (S.D. Iowa 2005).

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STATEMENT OF THE CASE

A. Procedural Background

On November 21, 2003, a federal grand jury returned a two count indictment charging Christopher Wayne Lamoreaux and Adina Lamoreaux alleging that the defendants defrauded their employer, NuCare Pharmaceuticals, Inc. (hereinafter NuCare) of honest and faithful services by taking secret commissions and kickbacks from Albers Medical, Inc., (hereinafter Albers), a Kansas City based pharmacy and pharmaceutical wholesaler, in connection with repackaging contracts with NuCare which utilized the United States mail in violation of 18 U.S.C. §§ 1341 and 2. Doc. #1.

At arraignment, both defendants entered pleas of not guilty and were released on their personal recognizance. Doc. #4.

On May 24, 2004, the United States filed a motion in limine announcing its intent to offer the testimony of Diana Coelyn, a former employee of H. D. Smith & Co. which purchased some of the drugs that had been repackaged by NuCare for Albers Medical, Inc. who pled guilty in a separate indictment earlier, that "(1) she received payments from Albers Medical, Inc.,

because she helped Albers Medical, Inc. find a market to sell its repackaged Bextra and Lipitor; (2) the amount of money received from Albers Medical was based on the amount of repackaged Bextra and Lipitor that Albers Medical, Inc. sold to her employer; (3) Diana Coelyn kept her receipt of these payments a secret and did not disclose her receipt of them to her employer; (4) Diana Coelyn knew it was wrong to take these secret payments and further knew that she should have disclosed receipt of them to her employer; and (5) Diana Coelyn pled guilty to charges of mail and wire fraud based on her receipt of these secret kickback payments from Albers Medical, Inc." The United States argued that because of the similarity of the two indictments- ie. similar drugs and kickbacks- that the evidence it intends to offer ". . . is direct and intrinsic evidence of the charged scheme in which Albers Medical, Inc. paid kickbacks to Chris and Adina Lamoreaux" and is inextricably intertwined with the fraud charge alleged in the Lamoreaux indictment. Doc. #22.

Appellant, in a pretrial pleading, countered that Coelyn's testimony was neither Rule 404(b) evidence nor inextricably

intertwined with the facts of his case and was, in any event, unfairly prejudicial under Fed. R. Evid. 403. Doc. #25.

Just prior to trial, in the wake of the United States Supreme Court's decision in *Blakely v. Washington, 124 S. Ct. 2531 (2004),* Appellant filed a motion to dismiss the indictment because of the failure to allege which sentencing factors would be utilized in determining a sentence if Appellant were convicted at trial. Doc. #31. The District Court denied the Motion to Dismiss holding that " *Blakely* does not invalidate indictments but simply affects punishments where a jury has not found enhancing factors which would cause sentencing beyond the statutory maximum." *Doc. #39, United States v. Lamoreaux,* 2004 WL 1557283 (W.D. Mo. July 7, 2004). However, the District Court went further, "Unless and until a new system is devised, I anticipate using pre-Guideline methods of sentencing, giving due deference to the facts and factors developed for sentencing use-but of course subject to statutory restrictions." *Id.*

Trial commenced July 12, 2004 and lasted four days. At a pretrial conference, Appellant again objected to the proposed

testimony of Diana Coelyn which the District Court took under advisement.

During the trial the government again sought to offer the testimony of Diana Coelyn. The District Court ruled that the government could present testimony from Coelyn but that she could not testify that she had pled guilty to a criminal offense related to her acceptance of commissions from Albers which it found to be unfairly prejudicial. The government elected not to call Coelyn as a witness in its case-in chief. *Trial Transcript at 305 (hereinafter Tr. at __).*

At the conclusion of the government's case-in- chief, both defendants moved for judgment of acquittal. The District Court granted a judgment of acquittal as to Adina Lamoreaux, Appellant's wife. Doc. #67. However, a judgment of acquittal was denied as to Appellant and the case proceeded to presentation of the defendant's case-in-chief. Doc. # 59. Appellant testified that the two checks received from Albers were to pay compensation and start-up expenses for a new company similar to NuCare called Dispense Rx formed by Appellant, Doug Albers, the owner of Albers Medical, Inc. and

Paul Kriger.[1] Tr. at 336. Appellant explained that he proposed this business venture to Albers and Kriger because he was unhappy with the way things were going at NuCare because of business issues and the fact that one of the principal owners of NuCare was the brother of his former wife. *Tr. at 352.*

After presentation of defendant's evidence, the government again sought to again present the testimony of Diana Coelyn. Appellant objected that the evidence was not proper rebuttal, and renewed all of his other former objections to her testimony. *Tr. at 451-52.*

Coelyn was called and testified that checks she had received from Albers were for commissions. Both before and after Coelyn testified, Appellant objected and moved for a mistrial. *Tr. at 460, 514, 522.*

A Motion for Judgment of Acquittal was made at the close of all the evidence and denied by the District Court. *Tr. at 524.*

The jury was instructed over Appellant's objection in Instruction H. Doc. # 62, *Tr. at* . The District Court, at the

[1]The name of Dispense Rx was changed to Dispense Express because California law only permits pharmacies to use the Rx symbol. Dispense Express remains in business today and Lamoreaux was its President and CEO until he resigned as a result of this conviction. *See Tr. at 419.*

request of the government and over Appellant's objections, submitted special verdict forms to the jury to make findings as to the amount of loss and whether Appellant abused a position of trust without any accompanying definitional instructions and with the general instructions and verdict forms.

Motions for Judgment of Acquittal or New Trial were filed and denied by the District Court. Docs. #71, 82.

Prior to the Sentencing Hearing held on November 3, 2004, both parties filed sentencing memoranda. Docs. #80,81.

At the sentencing hearing, the District Court indicated that it would follow its earlier ruling and consider the Presentence Report to be advisory. However, the District Court indicated,"[a]lthough to be candid about it, while this matter is pending before the Supreme Court, I have been very cautious about any sentencing that would be on a different basis than the Guidelines would provide." *Sentencing Transcript at 4.* The District Court then considered Appellant's objections which were addressed in the Presentence Report and in the sentencing memorandum filed on October 27, 2004 which

were related to the determination of the amount of loss and whether Appellant had abused a position of private trust. Doc. #81. The District Court made a finding the amount of loss to be $115,278.54 and producing a sentencing guidelines range of 21-27 months confinement. Appellant was sentenced at the bottom of the range to 21 months confinement followed by three years supervised release. The District Court also ordered a $200.00 mandatory penalty assessment and restitution in the amount of $115,278.54.

Thereafter, a timely Notice of Appeal was filed. . . . . .

B. Factual Background

Following his graduation from high school, Christopher Wayne Lamoreaux, joined the United States Navy, serving for four years. *Tr. at 340.* He was honorably discharged after serving overseas in the Persian Gulf War in 1991. *Id.* After his discharge, he worked part-time and attended school to receive a pharmacy technician certification. *Id.* Upon receiving certification as a pharmacy technician, he was hired by a company located in Long Beach, California called Quality Care Pharmaceuticals, (hereinafter, QCV) a licensed

pharmaceutical repackager, as its first customer service agent. *Tr. at 341, 342.* The company grew rapidly and Lamoreaux moved from customer care to purchasing to quality control and, ultimately operations manager. *Tr. at 342, 264.* After experiencing years of growth, QCV changed its business model from direct sales to internet based sales and it began to have financial and cash flow problems. *Id.* As QCV foundered, Lamoreaux and fellow employees Anthony Paydayao, QCV's warehouse manager and nephew of Lamoreaux; Adina Iliesi (Lamoreaux), who worked in QCV's quality control department; and Rob Huelskamp, the company's top producing salesperson formed a new company based on QCV's business concept called NuCare Pharmaceuticals, Inc. to service customers of QCV after its business failed. *Tr. at 343, 266.* Lamoreaux sought outside investors, including his brother-in-law, Felix Paydayao to fund the fledgling venture. *Id., Tr. at 266.* Lamoreaux became president and CEO, Felix Paydayao was responsible for the company's accounting functions, Anthony Paydayao served as operations manager, Adina Iliesi

(Lamoreaux) was responsible for quality control and Ron Huelskamp**,** outside sales. *Tr. at 345, 347.* Lamoreaux was responsible for locating an appropriate facility and regulatory issues to obtain licensing from the DEA, FDA and the California State Board of Pharmacy. *Tr. at 346, 348.* NuCare's business involved repackaging bulk pharmaceuticals into smaller units and selling the repackaged product to direct care providers such physician's offices and clinics for sale and distribution to patients and contract repackaging for a fee. *Tr. at 350.* During its first year, NuCare's gross sales were 1.7 million dollars with a net loss of $170,000.00. *Tr. at 349.* By 2003, the company's gross sales had grown to five million dollars. *Tr. at 381.* The company continued to grow in 2002. *Tr. at 351.* In 2002, Lamoreaux experienced marital difficulties and in July of 2002 was divorced from his wife, the sister of Felix Paydayao and aunt of Anthony Paydayao. *Tr. at 351-52.* Also, in late 2002 and early 2003, Lamoreaux entered into a romantic relationship with Adina Iliesi. *Tr. at 352-53.* Lamoreaux's marital situation and relationship with Adina

Iliesi began to create a strain within the working relationships at NuCare. *Tr. at 352, 271.*

In October 2002, Lamoreaux was contacted by Paul Kriger on behalf of Albers Medical, Inc. who asked to tour NuCare's facilities and set up a meeting to explore possibilities of establishing a business relationship. *Tr. at 353.* Albers was exploring whether if NuCare could supply a mail order pharmacy operated by Albers as well as a small Albers sales force in southern California and whether NuCare could perform contract repackaging for Albers. *Tr. at 354-55.* A meeting was arranged and an agreement was reached that NuCare would provide contract repackaging for Albers and that NuCare would supply Albers' pharmacy**.** The pharmacy began placing orders with NuCare in late December 2002 and ongoing discussions continued about a repackaging contract between Albers and NuCare. *Tr. at 355-56.* An agreement to repackage pharmaceuticals was reached in which Albers would acquire products from other suppliers who would send an invoice, prior to the arrival of the product at NuCare, to NuCare who would in turn fax a copy of the invoice to Albers.

The pharmaceuticals would be received by NuCare and repackaged in accordance with Albers' specifications. At the same time the drugs were being repackaged, NuCare would invoice Albers for the purchase price of the pharmaceuticals and the repackaging costs and Albers would wire transfer the invoice amount to NuCare. NuCare would then ship the product to Albers' customer and pay the supplier. *Tr. at 358.* Typically, the transaction between Albers and NuCare would be completed in two to three days. Lamoreaux believed the arrangement preferable to NuCare's regular billing practice which took up to thirty days or more to be paid for its work. *Id.* "I considered it prepayment, you know. Essentially, they're prepaid before NuCare really took ownership of that product. So the liability aspect, the financial liability aspect was removed from NuCare." *Id.* Four repackaging transactions occurred between Albers and NuCare. *Tr. at 361.* NuCare was compensated in full for all the repackaging jobs performed for Albers. *Tr .at 362.* Because of the size and profitability of the repackaging contracts with Albers, it was decided that

Lamoreaux and Anthony Paydayao should receive a commission. *Tr. at 172,259, 365.*

Also, in December of 2002, NuCare began advertising and recruiting for Adina Iliesi's (Lamoreaux), position because she had decided to leave NuCare because of the tense family situation surrounding the divorce between Chris Lamoreaux and his first wife. *Tr. at 353, 363-64.* Her resignation became effective when she left the company January 13, 2003. *Tr. at 250.* In early December 2002, she and Lamoreaux began the formation of a company called Consulting Ventures, LLC. *Tr. at 363.* Consulting Ventures was registered with the State of California sometime in February of 2003. When the previously mentioned commission was paid by NuCare to Lamoreaux, the check was made payable to Consulting Ventures. *Tr. at 179, 365.* Felix Paydayao was aware the check had been made payable to Consulting Ventures because he countersigned the check. *Tr. at 179.* Lamoreaux explained that the check was paid to Consulting Ventures because Felix Paydayao did not want to pay additional workman's compensation and payroll taxes on the commissions. *Tr. at 365-66.* In December 2002,

Lamoreaux had become more and more disenchanted with the situation at NuCare. This disenchantment centered not only around the fact that Lamoreaux was working with his former in-laws but also because there was deep disagreement over the issuance of stock options to the founding members of NuCare, the need for NuCare to secure a line of credit to fund expansion at the company and salaries. *Tr. at 363-64, 367-68, 271, 273.* Because of the differences within the company, Lamoreaux began considering various options that would allow him to operate the company the way he wanted. He considered having an investor buy out the the Paydayao family members. He discussed the option with Paul Kriger. *Tr. at 370-71.* Kriger told Lamoreaux that he thought "it would be better for him to start something from scratch". *Tr. at 370.*

In mid-January of 2003, Lamoreaux participated in a meeting attended by Paul Kriger, Doug Albers and Darren Lea, chief pharmacist at Albers' Kansas City Pharmacy. *Tr. at 421, 423.* The participants discussed the repackaging industry in general and the idea of starting a new company. *Tr. at 370-71, 423-24.* Kriger and Albers appeared interested and told him they

would get back to concerning the proposal. *Tr.425-26.* In late January 2003, Lamoreaux consulted with an attorney about legal issues that might arise if he left NuCare and formed a competing company. *Tr. at 371-72.* In the meantime, Kriger and Albers had shown increasing interest in the formation of a new company and "wanted to get the ball rolling on this new adventure." *Tr. at 372.* A meeting at the law offices of Eric Gordon, an attorney, occurred in late January 2003 to discuss the new company and its structure. *Tr. at 372, 429.* Participating in the meeting were Doug Albers, Paul Kriger and Lamoreaux. *Tr. at 429.* It was decided that the company would be called Dispense Rx. *Id.* Following the meeting, Gordon filed Articles of Incorporation for Dispense Rx with the California Secretary of State's office on February 3, 2003, with Lamoreaux as the incorporator and agent for service of process. *Tr. at 432-33, 441.*

On February 7, 2003, Paul Kriger directed Shari Webb, Albers office manager in Kansas City to cut check number 4271 to Consulting Ventures, LLC, 1921 North Creek Circle, Anaheim, California in the amount of $6,815.22. The memo portion of the

check contained the notation “Commissions-bextra 0103". An invoice from NuCare to Albers Medical contained an invoice number Bextra 0103. *Tr. at 53.* Webb was directed by Paul Kriger about whom to make the check payable, the amount and what to place in the memo section of the check. *Tr. at 118.* Doug Albers later asked Webb who Consulting Venteures was. Webb advised Albers she had been directed by Kriger to write the check. Albers said that he would discuss the matter with Kriger. *Tr. at 118.* Albers later told Webb, “that check’s okay, I’ve talked to Paul (Kriger) about it. *Tr. at 120.* On March 26, 2003, Webb issued check number 4319 to Consulting Ventures at the same address in the amount $108,463.32. The memo portion of the check contained the notation “NUCARE INV. 13342, 12873, 12622". Webb was told by Kriger what information to place on the check. *Tr. at 120.* The government introduced Invoice Number 13342 from NuCare to Albers dated March 10, 2003 for the purchase of Lipitor in the amount of $2, 277,131.21. *Tr. at 67.* The government also introduced in evidence Invoice Number 12873 dated February 26, 2003 in the amount of $1,612,548.28 for the purchase of Lipitor. The

invoice indicated “Chris L.” as the salesperson. *Tr. at 72-74.* Invoice 12622 from NuCare to Albers date February 28, 2003 for the purchase of Lipitor in the amount of $1,583,345.40 was also offered and admitted in evidence. *Tr. at 76-77.* Webb did not know if the memo setion of the second check related to the invoices because she just wrote what Kriger told her to write on the checks. *Tr. at 120.* If the check amounts had been booked by Albers as commissions then those amounts would be deducted as an expanse of the transaction and evenly divided between Albers and Kriger under the financial arrangements between them. *Tr. at 121-22.*

The check in the amount of $6,815.22 was issued to compensate Chris and Adina Lamoreaux for work and expenses that had been incurred in connection with the preliminary work to start Dispense Rx. *Tr. at 337-38.* After the check arrived, Adina Lamoreaux placed the check in a Consulting Ventures bank account. She did not show the check to Lamoreaux nor did she mention any reference to a NuCare invoice. *Tr. at 338.*

After a contentious business meeting between Lamoreaux, Huelskamp and Felix Paydayao, Lamoreaux resigned from NuCare. The meeting brought to a head all of the previous issues of finances, compensation and the issuance of stock options to founding members of NuCare. *Tr. at 375-77, 276-77.* After his resignation, Lamoreaux explored a number of business opportunities, including further discussions with Kriger about moving forward with Dispense Express. *Tr. at 380-82.* Lamoreaux discussed with Kriger how he would be compensated during the formation of Dispense Rx and that he needed a financial commitment from Kriger for that purpose. He advised Kriger that he would need about $10,000.00 a month to pay his and his wife's living expenses. *Tr. at 382.* Kriger and Albers deposited $250,000.00 into a Dispense Rx account that had been opened after the incorporation of Dispense Rx. Kriger advised Lamoreaux that he would send some money. Several days later, a check in the amount of $108, 463.32 to Consulting Ventures was received by Adina Lamoreaux and deposited in the Consulting Ventures account.

Adina Lamoreaux called Lamoreaux and advised him that a check had been received and the amount.

She did not, however, mention any reference to commissions on the check. *Tr. at 383-84.* Lamoreaux called Kriger who told him that the check was for his living expenses. Dispense Rx, later Dispense Express, was formed and in business at the time of the trial. *Tr. at 393.* . . . . . .

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SUMMARY OF THE ARGUMENTS

The District Court erred in denying Lamoreaux's Motions for Judgment of Acquittal and New Trial because the United States failed to prove that Lamoreaux caused a loss or intended a loss as required by the mail fraud statute.

The District Court further erred in permitting the United States to offer testimony from a witness who testified about her taking unreported commissions in an unrelated matter.

The District Court committed error in submitting, in a single instruction, an instruction which directed the jury to find an intent to defraud due to Lamoreaux's fiduciary duty to NuCare with the instruction which directed a finding of an intent to defraud, if the jury chose to make such a finding**,** the former negated the latter. Also the District Court erred in submitting special verdicts to the jury without any direction as to how to make findings and by submitting those special verdicts with the general verdicts.

Lastly, the District Court erred in failing to consider the factors set out in *18 U.S.C. § 3553(a)* in imposing a non-guideline sentence. as required by the Supreme Court's holding in *United States v. Booker*.

ARGUMENT

I. The District Court erred in denying Appellant's Motions for Judgment of Acquittal and New Trial because the government's evidence did not establish an intent to defraud nor loss to Appellant's employer

A. Standard of Review

In evaluating the denial of a Motion for Judgment of Acquittal on appeal, the evidence must be viewed in a light most favorable to the verdict, accepting all reasonable inferences

supporting the verdict. *United States v. Cruz, 285 F. 3d 692, 698 (8th Cir. 2002).* A verdict should be upheld if substantial evidence supports it. *Id.* at 697. Substantial evidence exists if a reasonably minded fact finder could have found a defendant guilty beyond a reasonable doubt. *Id.* "Reversal is appropriate only where a reasonable jury could not have found all the elements of the offense beyond a reasonable doubt." *Id.* citing *United States v. Armstrong, 253 F.3d 335,336 (8th Cir. 2001).*

B. Sufficiency of the Evidence of an Intent to Defraud

In order to sustain a conviction for mail fraud, the government must prove beyond a reasonable doubt that (1) a defendant engaged in a scheme to defraud; (2) that it was reasonably foreseeable that the mail or private carrier would be used in furtherance of the scheme to defraud; and that the mail or private carrier was used in furtherance of the scheme. An essential element of any mail fraud prosecution is a "scheme or artifice to defraud". 18 U.S.C. § 1341. "Essential to a scheme to defraud is fraudulent intent." *United States v. D'Amato, 39 F.3d 1249, 1257 (2nd Cir. 1994)* citing *Durland v. United States, 161*

*U.S. 306, 313-14 (1896).*A scheme to defraud does not have to be successful or cause injury to another. "However, the government must show 'that some actual harm or injury was contemplated by the schemer.'" *D'Amato 39 F.3d at 1257.* "Because the defendant must intend to harm the fraud's victims, 'misrepresentations amounting only to deceit are insufficient to maintain a mail or wire fraud prosecution'" *Id.* citing *United States v. Starr, 816 F.2d 94, 98 (2nd Cir. 1987).*

> . . . . . "Instead, the deceit must be coupled with a contemplated
> . . . . . harm to the victim" In many cases, this requirement poses
> . . . . . no additional obstacle for the government. When the
> . . . . . "necessary result" of the actor's scheme is to injure others,
> . . . . . fraudulent intent may be inferred from the scheme itself.
> . . . . . Where the scheme does not cause injury to the alleged
> . . . . . victim as its necessary result, the government must produce
> . . . . . evidence independent of the alleged scheme to show the
> . . . . . defendant's fraudulent intent.

Id. See also, United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996).

In prosecutions brought under the mail fraud statute for the deprivation of honest and faithful services under 18 U.S.C. § 1346, this Circuit Court of Appeals has recognized that the government bears a higher burden when the private sector is involved and there is no allegation or evidence of harm to the victim of the scheme to defraud,

> . . . It is certainly true that the literal language of § 1346 extends

. . . . . to the private sector schemes to defraud another of the right
. . . to "honest services." But the transition from public to private
. . sector in this context raises troublesome issues. In a democracy,
. . . citizens elect public officials to act for the common good. When

. . . official action is corrupted by secret bribes and kickbacks, the

. . . . essence of the political contract is violated. But in the private
. . . . . sector, most relationships are limited to concrete matters.
. . . . . Where there is no tangible harm to the victim of a private
. . . . . scheme, it is hard to discern what intangible "rights" have
. . . . . been violated.

United States v. Jain, 93 F.3d at 441-42.

In *Jain*, the Court held that the failure to disclose referral fees to patient "victims"of a psychiatrist who received appropriate treatment must have been material to constitute the crime of mail fraud. *Id.*

In order to comply with circuit precedent in *Jain*, the Court gave the jury, as part of Court's Instruction F regarding the scheme to defraud, the direction that the jury must find that the scheme to defraud NuCare of honest services *in obtaining the most advantageous contract with Albers that could be negotiated*. Yet the government failed to prove that any better contract could have been negotiated with Albers. As noted above, all the testimony established that NuCare received the best contract that it could have, made more money than it had ever in other

repackaging contracts and it had been timely paid for that contract.

In the present case, the government neither alleged nor did they prove any actual harm to NuCare. Nor did it prove any intent to harm NuCare outside the scheme itself. In fact, Felix Paydayao testified that NuCare made more money on the Albers' repackaging contracts than it had ever done before and that it received all payments in a timely manner. The government's evidence also demonstrated that NuCare was not at risk of non-payment by Albers' suppliers because the company received payment from Albers to pay for the pharmaceuticals from its suppliers before NuCare accepted the drugs for repackaging.

For example, Felix Paydayao testified that he was skeptical of the proposed repackaging agreement because it was too big. "Chris told me about this half million dollars to be added to our bottom line. And, you know, it was pretty shocking because as a new company, nobody does that like that ." *Tr. at 150.* "It's hard to believe that a half million dollars. We don't even make that in two years.: *Tr. at 151-52.* The repackaging contract with

Albers generated 5.7 million in sales to NuCare and represented unprecedented sales for the company. "It's like quadruple, triple a month what we've been doing from just those three invoices, 20 to 40 times more. It also, for those three invoices alone, its more than the sales of the year before." *Tr. at 200*.

With respect to payment:

> Q. All the invoices, all the invoices from vendors that came in bulk shipping matter were paid for by Albers?
> A. No. Albers paid us and then NuCare paid the vendors where Albers is owing from, sir.
> Q. You're not holding an invoice that you have to pay for because Albers hasn't paid?
> A. No.
> Q. And you put money in the bank as a result of those transactions for NuCare, yourself and the other employees to be paid, correct?
> A. Can you elaborate that a little bit?
> Q. Money that came out of those transactions was used for operating capital for NuCare to pay their bills in sales?
> A. It's a normal thing to do for a business.

Diana Coelyn's testimony did not contribute anything to demonstrate that NuCare did not receive anything but the best contract it could have received. While she testified that she received commissions from Albers Medical, her testimony did not prove any reasons why the commissions were paid to her or any motivation by Albers for doing so or that H.D. Smith paid

more for the repackaged Bextra and Lipitor than it would have absent the commissions paid to Coelyn. Thus, Coelyn's testimony does not contribute to any inference that could have been drawn by the jury that NuCare did not receive the best contract it could have received.

The District Court, in misplaced reliance on this Court's holding in *United States v. Pennington, 168 F.3d 1060 (8th Cir.1999),* denied the Motions for Judgment of Acquittal because it believed that an inference of an intent to defraud could be drawn from Appellant's failure to disclose the commissions to NuCare because he had a duty to do so as NuCare's President and CEO. However, *Pennington* is distinguishable from the instant case. In *Pennington*, the president of a foods company was convicted of mail fraud for receiving commissions from a consultant which he failed to disclose to his employer. This Court affirmed the conviction holding that ". . . proof of an intent to cause harm may be inferred from the willful non-disclosure by a fiduciary, such as a corporate officer, of material information he has a duty to disclose." *Pennington, 168 F.3d at 1065.* However, the facts in *Pennington* establish a material

harm to the foods company because at least one of the suppliers, SAJ, increased it prices by one percent to the company, to cover the costs of the payments paid to Pennington's co-defendant, a portion of which was the paid to Pennington. *Pennington, 168 F.3d at 1064.* In the instant case, no such harm to NuCare was ever proven.

Since the government offered no evidence that the repackaging contracts were not the best that could have been negotiated and, to the contrary, the evidence established that NuCare was paid substantial fees for repackaging the Lipitor, more than it had ever been paid in the past, the government had to prove an intent to harm NuCare independent of Lamoreaux's failure to disclose the commissions paid by Albers which it did not do. Moreover, reliance by the District Court on *Pennington* was error because the evidence did not establish material harm to NuCare, as did the facts of *Pennington*, to permit the inference drawn by the District Court in its instructions to the jury. Since the United States failed to prove, beyond a reasonable doubt, each and every element of the charged offenses, this Court should reverse the convictions.

II. The District Court erred in admitting the testimony of Diana Coelyn

The District Court, in permitting the government to offer the testimony of Diana Coelyn, expressed reservations about doing so. Defendant objected to the admission of Coelyn's testimony in its entirety raising the same grounds as in the Motion in Limine and for the reason that the testimony was not proper rebuttal. *Tr. at 451-52.* Counsel for defendant announced that they would not cross-examine Coelyn to avoid any prejudice which would arise from the admission of her plea agreement and plea of guilty and would move for a mistrial if she testified. *Tr. at 460, 514, 522.*

The government called Coelyn who testified that she was previously employed by H.D. Smith, a wholesale drug company, locating pharmaceuticals to purchase and sell to other entities as a salaried employee of the company during 2002 and 2003. *Tr. at 513* . She met Paul Kriger in 2002 and 2003. It was her understanding that Kriger was a business partner with Doug Albers and Albers Medical, Inc. She was involved with Paul Kriger in bulk transactions of Lipitor, Bextra and Celebrex.

which was repackaged in manufacturer quantities. As part of the transactions, she asked Paul Kriger, on behalf of Albers Medical to pay her commissions for the transactions she brokered. *Tr. at 514* . Further, that Albers Medical agreed to pay her commissions as she requested and that she received those commissions as agreed. *Id.* She further testified that some of the transactions involved her employer, H.D. Smith and that she did not disclose the payment of those commissions to H.D. Smith. *Tr. at 515-16.* The government introduced a series of checks and related documents which Coelyn identified as commission checks from Albers Medical, Inc. These checks were in various amounts from as small as $1781.12 to as large as $71,803.00. Some of the checks were made payable to CK Gem which Coelyn testified that she directed Albers and Kriger to forward to that company to pay for jewelry which she purchased at a discount from a jeweler that Kriger and Albers introduced to her. *Tr. at 521.* The checks were dated beginning in April 2002 tyhrough February 2003, well before the offenses charged in the indictment, to February 2003.

Only three of the twelve checks introduced by the government were from the period charged in the indictment all dated February 4, 2003. Gov. Exhibits 59A- 59M. Coelyn testified that all the checks were for commissions based on an understanding between herself and Doug Albers and Paul Kriger. She did not testify that her employer paid more for the pharmaceuticals than otherwise because of the payments by Kriger

At the conclusion of Coelyn's testimony, at the request of the government, the Court instructed the jury as follows:

> . . . . Members of the jury, I recognize that it is possible that some-
> . . . . one on the jury may wonder whether Ms. Coelyn or someone
> . . . . with Albers or Mr. Kriger have been or will be prosecuted or
> . . punished for the events described in the testimony of this case.
> . . . . . I advise you that that is not a subject about which the jury
> . . . . . should speculate. There will be no information on that. It is
> . . . . not a consideration that is pertinent to this case. This case is
> . . . to be decided based upon the law and the evidence relating to
> . . . . . Mr. Lamoreaux.

Tr. at 523. . . . . . .

. . . . . .

Admission of this testimony raises substantial issues for several reasons. First, as defendant had contended throughout the pretrial proceedings and trial, the testimony was completely improper because it related to conduct of others not charged in

the instant offense to establish a pattern and practice of those persons or entities or that the payment of commissions to one salesperson doing business with Albers constituted such a pattern. More importantly, however, the evidence offered did not live up to the government's representations regarding establishing a pattern and practice by Doug Albers and Paul Kriger. The testimony of Coelyn established that she asked to be paid a commission rather than Albers or Kriger offering such a commission to Coelyn which the Court believed demonstrated "an attempt to corrupt the salesperson on the other side." Rather than proving a pattern and practice by Albers and Kriger, the evidence elicited, at best, established a pattern and practice by Coelyn of soliciting commissions from her customers. Moreover, the government represented to the Court that the *exact* time period in which Coelyn was paid commissions would be established by her testimony. As presented, the evidence proved that Coelyn had been collecting commissions long before Albers and Kriger ever established any business relationship with Lamoreaux undermining the government's claim that Coelyn's acceptance of commissions

was inextricably intertwined with the evidence in this case. The testimony introduced other dissimilarities such as the payments directed to the jewelry store. Thus, the evidence adduced by the government was not sufficiently similar to be part of the *res gestae* of this case nor did it tend to prove a pattern and practice of Albers Medical, Inc.

Moreover, the Court's pre-admission ruling that the government could adduce evidence of Coelyn's plea to a criminal act, no matter how vague it would be left with the jury, if she were cross-examined about her agreement with the government left the defendant with a Hobson's choice of conducting the only meaningful cross-examination available, her plea agreement or conducting no cross-examination at all. Defendant had no choice but to forego any meaningful exercise of his Sixth Amendment right to confrontation of the witness against him or face the probability that irrelevant and highly prejudicial evidence would be admitted against him.

The evidence should have been excluded because the probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues and misled the jury.

Coelyn's testimony established that she sought and received commissions on the sales of certain pharmaceuticals to her employer, H.D. Smith. However, the government did not elicit or attempt to adduce any evidence as to why commissions were sought or why Albers would pay them. She did not testify that the prices paid by H.D. Smith would have been lower absent the commissions and that she could have negotiated a better price,.The unelaborated testimony left the jury to speculate that there was something apparently bad about the payment of the commissions without any understanding as to why this might be so. This in turn led the jury to speculate that the payment of commissions to Lamoreaux was bad in and of itself without regard to whether he had reported them to NuCare or not. While the Court instructed the jury that they were not to speculate about whether Coelyn, Albers or Kriger had been prosecuted, this instruction was inadequate to alleviate the prejudice and confusion created by the notion that the payment of the commissions was *malum in se.*

Lastly, the admission of Coelyn's testimony was not proper rebuttal evidence. The Court ruled the evidence admissible:

. . I would be prepared to rule for the Government that consistent
. . . . . with my theory that I earlier expressed, which is maybe a
. . . debatable evidentiary issue, that proof that Albers engaged in
. . . . . payment of commissions to salespeople on the other side is,
. . . . . in my judgment, admissible and is circumstantial evidence
. . . . . in support of the Government's theory that this also was a
. . . . . commission payment by Albers.
. . . . . I suppose again, it's debatable as to whether it is rebuttal,
. . . . . good rebuttal, but I think that it probably is because the
. . . . . way the case has developed, and we could not be sure how it
. . . . was going to develop, the Government could not be sure how
. . . . . it was going to develop, the issue of the characterization of
. . . . . what Albers did as a payment of a commission has become
. . . . . critical.

Tr. at 452.

As noted *supra*, the payment of commissions to Coelyn was not offered unsolicited by Albers. Coelyn asked for and received the commissions. The evidence adduced was not that Albers sought to somehow corrupt outside salespersons, but rather, that Coelyn sought payments from her customers in connection with her sales of pharmaceuticals to H. D. Smith. The payment of a solicited commission to one outside salesperson doing business with Albers simply does not rebut defendant's contention that the checks he received were salary and expenses for a new business venture with Kriger and Albers because even if the former is so, it does not make it more likely that the latter is also.

Since this error so prejudiced Lamoreaux's right to a fair trial, this Court should remand this case for a new trial.

III. The District Court erred in submitting Instruction H to the jury

The jury was instructed regarding the defendant's intent in instruction H. Instruction H reads as follows:

> . A defendant's intent or knowledge may be proved like anything else. You may consider any statements made by a defendant, and . . all the facts and circumstances in evidence which may aid in a . . . . . determination of a defendant's knowledge and intent. . . You may, but are not required to, to infer that a person intends . . harm when there is a wilful nondisclosure by a fiduciary, such . . . as a corporate officer, of material information he has a duty to . . . . . disclose. . . . . You are instructed that, by reason of his position at NuCare, ... defendant had a duty to disclose all material facts relating to . . . that company's business transactions, and otherwise act in its . . . . . best interests.

Court's Instruction H.

Defendant objected to giving the last paragraph of instruction H and the linkage of that paragraph to the instruction. Giving this instruction with the last two paragraphs linked as they were was error. By giving the latter paragraph in conjunction with the previous two paragraphs essentially nullified the previous by directing the jury find that defendant had an intent to defraud NuCare. Moreover, the second paragraph of the instruction does not correctly state the law regarding an intent to defraud under an intangible rights theory. Many courts have

concluded that under an intangible rights theory that not only must a defendant have intended to breach his fiduciary duty, but also, that the breach created a reasonablely foreseeable concrete economic risk to the victim. *United States v. Sun-Diamond Growers of California, 138 F.3d 961, 974 (D.C. Cir 1998); United States v. Turner, 125 F.3d 346, 369 (6th Cir. 1997).* (" a defendant accused of scheming to deprive another of honest services does not have to intend to inflict economic harm upon the victim. Rather, the prosecution must prove only that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk to the victim."). See also,*United States v. Jain, 93 F. 3d 436 (8th Cir. 1996); United States v. Frost, 125 F. 3d 346 (6th Cir. 1997).*

While it could be argued that instruction G was sufficient to cure any deficiencies in instruction H, Instruction G because it was given in a separate instruction and because it does not clearly state that an identifiable economic harm must be intended it is not sufficient to clearly and accurately convey the law.

Because Instruction H due to its structure which nullified the permissive findings on intent by directing the jury to conclude that defendant had an intent to defraud NuCare and because the instruction fails to advise the jury that a defendant must have reasonably foreseen some identifiable and concrete economic harm to NuCare, this Court should reverse and remand this case fro a new trial.

V. The District Court erred in submitting special verdicts to the jury

Despite concluding in the Order denying the Defendant's Motion to Dismiss the Indictment that the Federal Sentencing Guidelines were unconstitutional at the government's request and over the objections of the defendant, the Court submitted special verdicts to the jury requiring findings as to whether the defendant abused a position of trust and making a finding as to the amount of loss. No definitional instructions as to the meaning of these terms were given in conjunction with the special verdicts. Moreover, the special verdicts were included with the main body of the instructions over defendant's objection. This was error for two reasons.

First, giving the special verdict may have created some confusion among the jury members who may have believed that they were assessing some form of punishment for the defendant's actions, particularly with respect to amount of loss which the defendant would be fined or ordered to pay as restitution.

More importantly, however, with respect to amount of loss, the lack of definition caused the jury to assess a finding of loss where none existed. As noted *ante*, there was no economic loss to NuCare. The government did not prove that NuCare failed to receive the best possible price on the repackaging contracts related to the payment of commissions to Lamoreaux or otherwise for that matter. While amount of gain as a result of an offense may be utilized as an alternative measure of loss, U.S.S.G § 1B1.1 Comment.3(B), as the Court noted during one of the instruction conferences, the jury was never told that this was an appropriate measurement of loss. Without definition, the findings in the special verdicts were completely left to speculation by the jury as they had no measuring stick with which to measure the government's evidence. Moreover,

submitting the special verdicts to the jury was completely unnecessary given the Court's earlier ruling. Because the findings made by the jury as to the "special factors" of abuse of a position of trust and amount of loss should be set aside and the defendant should be given a new trial.

VI. The District Court erred in finding a loss, for sentencing purposes,

in the amount of $ 115,278.54

The sentencing range is not 21-27 months. As noted above, the government failed to prove, by any standard, that NuCare did not receive the best price it possibly could under the repackaging contracts negotiated by Lamoreaux. There was no testimony from Albers Medical, Inc or any of its personnel that it paid less for the repackaging of the Lipitor or would have paid more to NuCare, absent the payments to Lamoreaux. The government's pleading that Diana Coelyn's testimony establishes that she received kickbacks from Albers in connection with brokering the Lipitor contracts to her employer, H.D. Smith & Co. While she acknowledged that she received payments from Albers as commissions which she did not report to her employer, she did not acknowledge that H.D. Smith & Co.

paid more for the pharmaceutical deals she brokered. Coelyn's testimony, as such, does not establish even an inferential connection between the prices paid on the contracts and the payment of money by Albers to Lamoreaux. The only testimony regarding payments came from Felix Paydayao who was skeptical of the repackaging arrangement, in part, because of how lucrative the contracts were for NuCare. Since no loss was proven at all, it would be improper to assess any loss figure for purposes of enhancing Lamoreaux's sentence. As noted, *supra*, the guidelines permitting the use of gain resulting from an offense apply only if there is a loss which cannot otherwise be reasonably determined. Gain may not serve as a proxy for loss where there has been no demonstrable actual or intended loss. *United States v. Chatterje, 46 F.3d 1336, 1342, (4th Cir. 1995).* Since the District Court erred in imposing sentence in this case, this Court should remand for resentencing in accordance with 18 U.S.C. 3742(f).

VII. The District Court erred in imposing a non-Sentencing Guidelines sentence without giving due consideration of the factors in 18 U.S.C. §3553(a) as required by the Supreme Court's holding in *United States v. Booker*

The District Court erred in sentencing Lamoreaux to 21 months without considering the factors set forth in 18 U.S.C. § 3553(a). After sentencing and following the filing of the Notice of Appeal in this case, the United States Supreme Court issued its opinion in *United States v. Booker, 125 S. Ct. 738 (2005).* In *Booker*, the Court concluded that because the Federal Sentencing Guidelines impose upon judges the obligation to examine evidence and make factual findings that could increase a defendant's sentence above what would be permitted by a jury's verdict alone, the Guidelines were found to be unconstitutional. *Booker, 125 S.Ct. at [*49].* A different majority, in an unexpected decision decided that the guidelines could be applied in a constitutional manner by making them advisory by excising from the *Sentencing Reform Act* (hereinafter *SRA*) 18 U.S.C. § 3553(b)(1) mandating the use of the guidelines by sentencing judges and 18 U.S.C. § 3742(e) and substituting "a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'". *Booker 125 S.Ct. at [*80].* The Court directed sentencing judges to consult the factors set forth in Section 3553(a) as well as the guidelines in accordance with Section 3553(a)(4) as well as the pertinent

Sentencing Commission policy statements and consider the need to avoid unwarranted sentencing disparities and the need to provide restitution to victims before imposing a sentence. *Booker, 125 S.Ct. at* [*77].

18 U.S.C.§ 3553(a) requires sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." Section 2 of 3553(a) states those purposes to be: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to the criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational, medical care or other correctional treatment in the most effective manner. Section 3553(a) further directs a court to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

Recently, a district court has held that ". . . in every case, courts must now consider all of the § 3553(a) factors, not just the guidelines. And where the guidelines conflict with other factors set forth in § 3553(a), courts will have to resolve the conflicts.*United States v. Ranum, 2005 U.S. Dist. LEXIS 1338, [*6] (E.D. Wisc. 2005).* For example, the District Judge noted:

. . . . . .
For example, under § 3553(a)(1) a sentencing court must
. . . . . .
. . . . . consider the " history and characteristics of the defendant."
. . . . . .
. . . . . But under the guidelines, courts are generally forbidden
. . . . . .
. . . . . To consider the defendant's age *U.S.S.G. § 5H1.1*, his
. . . . . .
. . . . . education and vocational skills,*§ 5H1.2*, his mental
. . . . . and
. . . . . .
. . . . . emotional condition, *§ 5H1.3*, his physical condition,
. . . . . .
. . . . . including drug or alcohol dependnence, *§5H 1.4*, his
. . . . . .
. . . . . employment record, 5H1.5, his family ties and
. . . . . .
. . . . . responsibilities, *§ 5H1.6*,
. . . . . his socio-economic status.
. . . . . .
. . . . . *§ 5H1.10*, his civic and military contributions, *§ 5H1.11*,
. . . . . .
. . . . . and his lack of guidance as a youth, *§ 5H 1.12*. The guide-
. . . . . .
. . . . . lines prohibition of considering these factors cannot be
. . . . . .
. . . . . squared with the § *3553(a)(1)* requirement that the court

. . . . . .
. . . . . evaluate the "history and characteristics" of the defendant.
. . . . . .
. . . . . Thus, in cases in which a defendant's history and character
. . . . . .
. . . . . Are positive, consideration of all of the *§ 3553(a)* factors
. . . . . .
. . . . . Might call for a sentence outside the guideline range.
*United States v. Ranum, 2005 U.S. Dist. LEXIS 1338, [*6-7] (E.D. Wisc. 2005).*

That Court further noted the command of *§ 3553(a)(2)(D)* requires a sentencing court to evaluate the need tp provide the defendant with education and training, treatment, or medical care in the most effective manner. This directive might conflict with the guidelines, which in most cases offer only prison." *Id.* The Court also observed that the *§ 3553 (a)(7)* requires that a court consider the need for restitution to any victims which might be best accomplished by imposing a short sentence of confinement or none at all. Lastly, the court concluded that the guidelines "will clach with *§ 3553(a),*'s primary directive to 'impose a sentence sufficient , but not greater than necessary to comply with the purposes' of sentencing." In that case, the District Court imposed a non-guidelines sentence of twelve months and one day in lieu of a guidelines sentence of 37-46

months. *United States v. Ranum, 2005 U.S. Dist. LEXIS 1338, [*20] (E.D. Wisc. 2005).*

In *United States v. Myers, 2005 U.S. Dist. LEXIS 1342 (S.D. Iowa 2005),* the District Court adopted the analytical approach and rationale of the District Judge in *Ranum*.

. . . . . .
. . . . . At first blush, a system of discretionary sentencing would
. . . . . .
. . . . . appear to invite what Congress hoped to avoid, unfairness
. . . . . .
. . . . . in sentencing. The Supreme Court in *Booker*, however,
. . . . . .
. . . . . reminded judges and the public that true uniformity
. . . . . .
. . . . . exists not in a one-size-fits-all scheme, but in "similar
. . . . . .
. . . . . relationships between sentence and real offense conduct."
*United States v. Myers, 2005 U.S. Dist. LEXIS 1342, [*9](S.D. Iowa 2005).*

In imposing a non-guidelines sentence, the District Court determined that under the now advisory guidelines a sentence to be 20-30 months with an available departure for aberrant behavior but also considered the nature and circumstances of the offense, the history and characteristics of the defendant the need for the sentence imposed, promotion for respect for the law, the need for just punishment, general and individual deterrence and the needs of the defendant. *United States v.*

*Myers, 2005 U.S. Dist. LEXIS 1342 (S.D. Iowa 2005). See also United States v. Crosby, 2005 U.S. App. LEXIS 1699, [*23] (2nd Cir. 2005).*

In *Crosby,* the Court of Appeals for the Second Circuit concluded that appellate review under the now standard of "reasonableness" of a sentence that review is not limited to determining whether the length of a sentence is reasonable but also, [i]f a sentencing judge committed a procedural error by selecting a sentence in violation of applicable law, and the error is not harmless or available for review under plain error analysis, the sentence will not be found reasonable." *United States v. Crosby, 2005 U.S. App. LEXIS 1699, [*27] (2nd Cir. 2005) (citations omitted).*

The Second Circuit, in *Crosby*, noted that *Section 3742(f)* requires remand with further instructions as the court considers appropriate where a sentence is imposed in violation of law. "[W]e conclude that the 'further sentencing proceedings' generally appropriate for pre-Booker/Fanfan sentences pending on direct review will be a remand to the district court, not for the required purpose of resentencing, but only for the more

limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so,to resentence." *United States v. Crosby, 2005 U.S. App. LEXIS 1699, [*37] (2nd Cir. 2005).*

In this case, the District Court correctly ruled the guidelines unconstitutional and instituted sentencing procedures in which it considered the guidelines advisory and imposed two sentence, a guidelines sentence and a non-guidelines sentence. In this case, the two sentences were identical. The Court explained, "[a]lthough to be candid about it, while this matter is pending before the Supreme Court, I have been very cautious about any sentencing that would be on a different basis than the Guidelines would provide." *Sentencing Transcript at 4.*

However, the District Court did not consider any of the factors in *Section 3553(a)* in imposing sentence, although few would have anticipated that requirement. Nor did the District Court explain its reasons for selecting the non-guidelines imposed other than the above-noted reference to the cases then pending in the United States Supreme Court.

For this reason, this Court should remand this case for the purposes of allowing the District Court to consider imposing a different sentence after considering the factors set forth in *Section 3553(a).*

CONCLUSION

For the above and foregoing reasons, Christopher Wayne Lamoreaux respectfully requests this Court to grant the relief requested as to each of the points raised in the argument portion of his brief.

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. . . . . Respectfully submitted,

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CERTIFICATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect, Version 9 in a Century Schoolbook typeface with a font size of fourteen. The computer disk accompanying this brief has been scanned with Norton Utilities Virus Scan ,Norton SystemWorks Version 2001, and has been found to be free of viruses known to the program.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two copies of the foregoing Brief for Appellant were served by United States mail on Gene Porter ,Assistant U.S. Attorney, 400 East 9th Street, Kansas City, Missouri 64106 this 10th day of February, 2005.

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